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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-953

CHARLES BEN HOWELL ..... *Petitioner*

v.

CLARENCE JONES, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR REHEARING

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Petitioner submits that the Fifth Circuit has not followed its own recent authority, decided only shortly before the decision of the case in bar, U. S. v. Huff, 512 F.2d 66 (5-Ga.1975). Held, where the sentencing judge considered an ex parte memorandum from the United States Attorney, the case must be reversed. Inasmuch as the violation of judicial ethics occurred at the sentencing stage, the reversal was limited to reversal for re-sentencing before another judge.

The case cannot be distinguished simply as a federal housekeeping decision because it was primarily grounded upon Haller v. Robbins,409 F.2d 857 (1-Me.1969), an identical situation complained of in habeas by a state prisoner. Undisclosed ex parte communications are violative of due process.

Nor can the case be distinguished because the indiscretion occurred at the sentencing stage rather than the guilt stage of a trial. If anything, the reverse should be true. It is established that a sentencing judge may consider a wide variety of matters. A trying judge deciding or even presiding over trial of the guilt stage is held strictly to the evidence duly admitted in open court.

See also, People v. Corelli, 343 N.Y.S.2d 555(A.D.1973) reversing a conviction because the judge failed to disclose that while serving as district attorney, he had presented other charges against the same defendant to the grand jury.

In the case at bar, the Fifth Circuit held by necessary inference that the petitioner was burdened to show that the judge was actually influenced. None of the ex parte cases so holds and, as a practical matter, the ruling makes relief from ex parte communications virtually impossible to obtain. See People v. Superior Court, 113 Ca.R.732 (Ca.Ap. 1974) holding that the existence of actual prejudice is almost impossible to prove; the law therefore gives relief from

situations creating the appearance of bias. Accord: Withrow v. Larkin, 421 U.S. 35 (1975).

Of course, petitioner cannot prove exactly what was said at that confidential meeting between the trying judge, the complaining judge and the special prosecutor for the simple reason that he was not permitted to even know that the meeting had taken place. Ex parte contacts are always carried out in a manner calculated to leave the opposing party in the dark that the communication has even been made.

What petitioner can prove, and easily so, is that this type of conduct has no place in our Anglo-American tradition of an adversary system of justice. Simple logic also proves that the only effective hope of curbing this type of conduct is not to gloss over the facts when the case reaches the appellate stage, but to hold accountable those who have participated in trifling with the chosen tribunal. Until the burden is put upon those who know the facts to affirmatively demonstrate the harmless nature of the occurrence, no relief can be had by the complaining party.

None of the foregoing authorities were included in the petition for certiorari and petitioner in the exercise of reasonable diligence did not discover them in time to so include them. They confirm that this case was incorrectly decided by the Fifth Circuitand that the error was of substance. The only effective method

of discouraging ex parte communications is to reverse the case when it occurs. Only the judiciary can police the judiciary. In this case, the lower courts have avoided the task. Will the Supreme Court of the United States avoid it also?

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the appellant, I hereby certify this petition for rehearing is presented in good faith and not for delay. I further certify that it is restricted to the grounds specified in Supreme Court Rule 58(2).

H. AVERIL SWEITZER